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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 696

THE UNITED STATES, PETITIONER

v.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION

No. 697

THE UNITED STATES, PETITIONER

v.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (No. 696, R. 43–49; No. 697, R. 44–45) are not yet officially reported.[1]

JURISDICTION

The judgments of the Court of Claims were entered on May 7, 1945 (No. 696, R. 49; No. 697,

[1] These cases, Nos. 696 and 697, were heard, argued, and submitted together in the court below (No. 697, R. 44).

R. 46). Motions for new trials were overruled on October 1, 1945 (No. 696, R. 50; No. 697, R. 46). The petition for writs of certiorari was filed on December 27, 1945, and was granted on March 4, 1946 (No. 696, R. 51; No. 697, R. 48). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether, under standard form government contracts, the Court of Claims can substitute its judgment as to the interpretation of plans and specifications for that of the constructing quartermaster, where the specifications designated the latter as the "interpreter" of plans and specifications, and where the contractor did not appeal from the constructing quartermaster's ruling, as required by Article 15 of the contract.

2. Whether a contractor may recover the amount of an increase in wages paid to certain of its employees "under protest" where (a) the contractor failed to take an administrative appeal from the order of the constructing quartermaster to pay the increased wages, and where (b) the increased wages were not established by the only agency whose determination would effect an automatic increase in compensation.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contracts and specifications involved are set forth in Appendix A, *infra*, pp. 43–47.

STATEMENT

On November 2 and 29, 1933, respondent entered into two contracts with the United States, through the War Department, to construct officers' quarters at Fort Sam Houston, Texas, which were being built as a Federal Emergency Administration of Public Works project (No. 696, R. 29–30; No. 697, R. 30–31). The November 2 contract, that involved in No. 697, was for the construction of 59 officers' quarters (R. 30–31); the November 29 contract, that involved in No. 696, for the construction of 16 officers' quarters (R. 29). The two contracts involved "the same project * * * and where the buildings under one contract left off, the others began" (No. 697, R. 44). The work under the contracts was to be completed in September and October 1934 (No. 696, R. 30; No. 697, R. 31) but, because of delay not here in issue, the work was not accepted as complete until November and December 1934 (No. 696, R. 40; No. 697, R. 41).

On January 12, 1938, respondent brought these suits in the Court of Claims (No. 696, R. 1–11; No. 697, R. 1–12) to recover, *inter alia*, with respect to each contract, (1) certain payments for excavations for footings (No. 696, R. 7–8; No. 697, R. 7–8) and (2) increased wages paid to its bricklayers (No. 696, R. 4–5; No. 697, R. 4–5).[2]

[2] Respondent also sought to recover compensation for extra work performed, increased costs for lumber purchased, and liquidated damages assessed against it (No. 696, R. 3–10;

Judgments were entered for respondent on both claims (No. 696, R. 33–38, 43–49; No. 697, R. 34–39, 44–46).[3]

1. *Footing Depths.*—Paragraph 3 (No. 696, R. 36; No. 697, R. 37; *infra*, pp. 45–46)[4] of the specifications directed respondent to excavate for footings "down to the depth and levels shown on drawings" and provided that if "suitable bearings [should] not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M."[5] Paragraph 3 further provided that—

> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount

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No. 697, R. 3–10). These claims were rejected by the court below (No. 696, R. 31–33, 35–36, 38–43, 45–46, 48–49; No. 697, R. 32–34, 36–37, 39–45).

[3] In No. 696, judgment was entered for respondent in the amount of $6,614.82 (R. 43, 49) consisting of $821.63 allowed on the claim for increased wages paid to bricklayers (R. 34, 45) and $5,793.19 allowed on the claim with respect to footing excavations (R. 36, 38, 48). In No. 697, judgment was entered in the amount of $8,221.87 (R. 44–46) consisting of $3,299 allowed on the claim for increased wages paid to bricklayers (R. 36, 45) and $4,922.87 allowed on the claim with respect to footing excavations (R. 37, 39, 45).

[4] Since the two contracts, except for the number of officers' quarters being erected thereunder and amounts, are virtually identical, reference herein to portions of the contract or specifications are applicable to the contracts and specifications in both cases.

[5] The constructing quartermaster. Paragraph G. C. 2 of the specifications, *infra*, p. 45.

mentioned for excavating under "Unit Prices" of bid.

Paragraph 4 of the specifications (No. 696, R. 36–37; No. 697, R. 37–38, *infra*, pp. 46–47) provided that

> * * * excavation will extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended * * * For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

The court below found that "the depth of footings was shown on the drawings as 33 feet from the finished floor of the building, and it was on this depth that [respondent] estimated its bid" (No. 696, R. 37; No. 697, R. 38).

Respondent excavated to the depths approved by the Government's inspectors (No. 696, R. 37; No. 697, R. 39). These depths ranged, in No. 696, from 29 feet to 37.5 feet below first floor level and averaged 32.49 feet below that level (R. 37); and, in No. 697, from 27.58 feet to 42.42 feet below first floor level and averaged 34.43 feet below that level (R. 39). In making payment under the contracts, the Government made extra allowance to respondent for excavation in excess of 37 feet 6 inches and, where actual excavation was less than 37 feet 6 inches, withheld from the

contract price the appropriate amount under the unit prices established by the contracts (No. 696, R. 37–38; No. 697, R. 39). In No. 696, the adjustment resulted in a net deduction of $5,793.19 from the contract price (R. 38); in No. 697, a net deduction of $4,922.87 (R. 39) These deductions were calculated by the constructing quartermaster and applied by the paying officer (No. 696, R. 38; No. 697, R. 39).

The court below held that the question concerning the correct footing depths to be applied in determining the amount to be paid to respondent or the amount to be deducted from the contract price "was not a controversy over what work the contract and its specifications required" but rather "a question of how the contract price is to be computed" and that, in view of the fact that the contracts stated on their "face that [they are] 'To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, * * * * * * * the responsibility for making correct payment was on the Finance Officer, the paying officer" (No. 696, R. 47).[6] The court stated that for this reason "the decision of the contracting officer as to the amount thereof would have been advisory, at the most, and there was no appealable decision confronting" respondent (No. 696, R. 47). The court

[6] Although there is a separate opinion of the court below in each of these cases (No. 696, R. 43–49; No. 697, R. 44–45), the reasons underlying the decision in No. 696 were adopted by the court below in No. 697 without further elaboration.

below further held that "an inconsistency" between the drawings and the specifications as to the footing depths was "impossible to reconcile" and that "the 33-foot pay basis is the more logical of the two" (No. 696, R. 46–47).

2. *Bricklayers' Wages.*—Article 18 (a) of the contracts (No. 696, R. 23, 33; No. 697, R. 23, 34; *infra*, pp. 43–44) provided that respondent should pay wages of not less than $1.00 per hour for skilled labor.[7] Article 18 further provided (No. 696, R. 23–24, 33; No. 697, R. 24, 34–35; *infra*, p. 44):

> (c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply * * *.
>
> * * * * * *
>
> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the

[7] While in No. 697 Article 18 (a) originally provided a minimum of $1.10 per hour for skilled labor, this was subsequently modified by the parties to $1.00 per hour (R. 34–35).

project to the contractor, whether under this contract or any subcontract.

On March 3, 1934, the Board of Labor Review of the Federal Emergency Administration of Public Works ruled that bricklayers employed on another project for Army construction, at San Antonio, Texas,* to which respondent was not a party, should be paid at the rate of $1.25 per hour retroactive to February 2, 1934 (No. 696, R. 34; No. 697, R. 35). This decision was transmitted to respondent by the constructing quartermaster on March 20, 1934 (No. 696, R. 34; No. 697, R. 35). On March 23, 1934, the constructing quartermaster advised respondent that all bricklayers employed on the project here involved "will be paid at the rate of $1.25 per hour" (No. 696, R. 34; No. 697, R. 35). On March 29, 1934, respondent stated "that it would be governed accordingly but under protest, and [that it] expected reimbursement of the difference of 25 cents per hour" (No. 696, R. 34; No. 697, R. 35). On May 12, 1934, the constructing quartermaster "advised" respondent "that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity should be paid $1.25 per hour, retroactive to February 2, 1934," and that respondent "would be within its 'rights to file appeal with the Board of Labor Review

*"Fort Sam Houston and San Antonio are in the same vicinity" (No. 696, R. 45).

from the decision of the contracting officer'" (No. 696, R. 34; No. 697, R. 35). Respondent took no such appeal and paid its bricklayers $1.25 per hour (No. 696, R. 34–35; No. 697, R. 36).

The court below held that "the ordered increase of 25 cents an hour in the wages increased the contract price under the terms of Article 18 (e)" and that "it was plainly of no special interest to [respondent] to * * * appeal [to the Board of Labor Review], for the contract provided an automatic increase in contract price to cover such an increase in wages" (No. 696, R. 45).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that the dispute as to footing depths was not one which the parties had agreed to submit to the constructing quartermaster and the contracting officer for final determination.

(2) In holding that it had authority to reconcile the dispute as to footing depths and to substitute its judgment for that of the constructing quartermaster.

(3) In holding that the finance officer's duty to make payments under the contracts deprived the constructing quartermaster and the contracting officer of the authority to make a binding ruling as to footing depths.

(4) In holding that 33 feet was the proper footing depth to be applied.

(5) In holding that the minimum wage rates were increased under Article 18 (e) of the contracts.

(6) In failing to hold that the increased minimum wage rates were paid by the respondent pursuant to directions under Article 18 (c) of the contracts, for which the United States assumed no liability.

(7) In failing to hold that there was a dispute, as to whether increases in minimum wage rates were ordered under Article 18 (e) of the contracts, which the parties had agreed to submit to the contracting officer under Article 15.

(8) In entering judgments for the respondent.

SUMMARY OF ARGUMENT

The basic error of the court below lay in its failure to follow or apply the plain provisions of standard form Government contracts, particularly those relating to the administrative settlement of disputes arising under the contracts.

1. The contracts provided that "In case of difference between drawings and specifications, the specifications shall govern" (No. 696, R. 14; No. 697, R. 14; *infra*, pp. 43, 45) and that the constructing quartermaster "shall be the interpreter" of the "intent and meaning of the drawings and specifications" (No. 696, R. 30; No. 697, R. 31; *infra*, p. 45). The court below, however, refused to accord finality to the constructing quarter-

master's interpretation of the drawings and specifications with respect to the basis on which respondent would be paid for footing excavations, but gave judgment for respondent, despite the constructing quartermaster's adverse decision and despite respondent's failure to avail itself of the standard procedure provided in Article 15 of Government construction contracts for the settlement of disputes. In this, the decisions below run counter to the whole course of decision of this Court in Government contract litigation.

While these errors of the court below are, we believe, dispositive of these cases with respect to the footing-excavation claims, we submit that the constructing quartermaster's interpretation of the specifications and drawings was correct and that of the court below erroneous.

2. Respondent's failure to take the administrative appeal provided by the contracts is fatal also to its claim as to the increased wages paid by it to its bricklayers. The very ambiguity as to the basis for the increase underscores the need for such appeal to clarify the issue.

In any event, the interpretation by the court below of the wage provisions of the contracts was erroneous. Only if the increased wage rates paid by respondent were established by the Federal Emergency Administration of Public Works was respondent entitled to a contract price adjustment on their account. The increased rates paid by respondent were not so established.

Nevertheless, the court below in effect awarded respondent an adjustment in contract price measured by the amount of the increase.

ARGUMENT

The contracts here involved were both executed on U. S. Government Form No. P. W. A. 51 (No. 696, R. 12, 30; No. 697, R. 12, 31), "the critical provisions of which are substantially the same as those in the standard form of Government construction contract." *United States* v. *Blair*, 321 U. S. 730, 731. Those provisions are not novel to this Court. *Plumley* v. *United States*, 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *United States* v. *McShain*, 308 U. S. 512, 520–521; *United States* v. *Callahan Walker Co.*, 317 U. S. 56; *United States* v. *Blair*, 321 U. S. 730; *United States* v. *Beuttas*, 324 U. S. 768.

The prime error of the court below was its refusal, contrary to the decisions of this Court, to accord to those provisions the meaning and content which the parties to the contracts intended. The court's assumption of authority to interpret the contracts, specifications, and drawings with respect to matters left by the contracts and specifications to the exclusive determination of the Government's officers designated therein, its disregard of Article 15 of the contracts, which directs that all "disputes [except "labor issues"] concerning questions arising under this contract

shall be decided by the contracting officer * * * subject to written appeal * * * to the head of the department" (No. 696, R. 21; No. 697, R. 21–22; *infra*, p. 43), and its failure to follow or apply the controlling decisions of this Court, all lead to the conclusion that the decision below is erroneous.

I. THE UNITED STATES IS NOT LIABLE UNDER ITS CONTRACT FOR EXTRA PAY FOR THE FOOTING EXCAVATIONS

Paragraph 3 of the specifications (No. 696, R. 36; No. 697, R. 37; *infra*, pp. 45–46) required respondent to excavate "for footings * * * down to the depth and levels shown on drawings." Paragraph 4 of the specifications (No. 696, R. 37; No. 697, R. 38; *infra*, pp. 46–47) provided that "for estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level" and that "for any additions or deductions" "the unit prices quoted in bid will govern." Paragraph 45 of the specifications (No. 696, R. 37; No. 697, R. 38; *infra*, p. 47) provided for additional payment to respondent for the "Extension of foundations beyond dimensions given on the drawings" and for deduction from the contract price "If solid foundation is found at a lesser depth than the dimension given on the drawings."

The court below found that the "depth of footings was shown on the drawings as 33 feet from the finished floor of the building, and it was on this

depth that [respondent] estimated its bid." (No. 696, R. 37; No. 697, R. 38). The court below held that, with respect to the question as to the depth of the footing excavations which was to serve as the basis for respondent's receiving extra compensation or the Government's receiving a credit, there was "an inconsistency" which it was "impossible to reconcile" (No. 696, R. 46–47). With respect to this irreconcilable "inconsistency," however, Article 2 of the contract (No. 696, R. 14; No. 697, R. 14; *infra*, p. 43) provided:

> In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer.

The specifications, in paragraph G. C. 21 (*infra*, p. 45), made identical provision for the resolution of such discrepancies and provided further, in paragraph G. C. 10 (No. 696, R. 30; No. 697, R. 31; *infra*, p. 45), that "the C. Q. M.[9] shall be the interpreter" of the "intent and meaning of the drawings and specifications."

The constructing quartermaster resolved the discrepancy between the specifications and the drawings with respect to footing depths, in accordance with Article 2 of the contract and para-

[9]The constructing quartermaster. See note 5, *supra*. Paragraph G. C. 7 of the specifications provided that "the work is entirely under the control of the C. Q. M."

graph G. C. 21 of the specifications, and computed pay for the footing excavations on the basis of an estimating depth of 37 feet 6 inches as provided in paragraph 4 of the specifications. The court below, however, disregarded the plain terms of the contract, which not only designated the constructing quartermaster as the person to make such decisions, but also guided him by providing that "in case of difference between drawings and specifications, the specifications shall govern"; substituted its interpretation for that of the Government officers who the parties to the contract had agreed would settle such questions of interpretation; and held that pay for the footing excavations should have been computed on the basis of an estimating depth of 33 feet. In all these respects, as we shall show, the court below was in error.

A. RESPONDENT WAS BOUND BY ITS AGREEMENT THAT THE CONSTRUCTING QUARTERMASTER'S INTERPRETATION OF THE DRAWINGS AND SPECIFICATIONS WOULD BE FINAL AND CONCLUSIVE

The court below found that "an inconsistency" (No. 696, R. 46) existed between the specifications and the drawings with respect to the basis upon which pay for footing excavations was to be computed. Such "an inconsistency" necessitated the determination of the "true intent and meaning of the drawings and specifications." Paragraph G. C. 10; No. 696, R. 30; No. 697, R. 31; *infra*, p. 45. And the parties had agreed, in the very same

paragraph, that the constructing quartermaster would be the "interpreter" to resolve this and any other inconsistencies.

This Court has repeatedly held that ambiguities in plans and specifications under Government contracts pose questions susceptible of final and conclusive determination by the Government officer designated in the contracts. *Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *United States* v. *McShain*, 308 U. S. 512, 520–521. Indeed the court below, despite its failure to apply that principle in these cases, has itself recognized it, saying (*Beattys* v. *United States*, 101 C. Cls. 748, 768, reversed, 324 U. S. 768):

> It is true that it is not uncommon in construction contracts for the parties to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications * * * and similar matters of fact.

With the authority thus vested in him by the contract and specifications, the constructing quartermaster interpreted the specifications and drawings as meaning that the footing excavations were to be paid for on the basis of an estimated depth of 37 feet 6 inches. That determination was conclusive upon the parties to the contract and on the courts, and may not now be questioned, absent a showing of bad faith or error so gross as to

imply bad faith." *United States* v. *McShain*, 308 U. S. 512, 520–521; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, affirmed on rehearing, 261 U. S. 610; *Kihlberg* v. *United States*, 97 U. S. 398, 400; *Sweeney* v. *United States*, 109 U. S. 618; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185. There is no suggestion of bad faith in the findings or opinions below. Nor, despite the disagreement of the court below with the constructing quartermaster's determination as to footing depths, is there a

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" While the court below held that the question as to whether the "pay-basis" of the footing excavations should be 33 feet or 37 feet 6 inches "was not a controversy over what work the contract and its specifications required" but "a question of how the contract price is to be computed" (No. 696, R. 47), the provisions of the contract and the specifications, *infra*, pp. 43, 45, relating to the resolution of differences between drawings and specifications and the interpretation of the meaning of the drawings and specifications do not refer and are not limited to questions as to "what work the contract and its specifications required." They are of broad scope and govern as well the provisions in the specifications which bear upon the computation of payment as they do provisions regarding how the work is to be done and what standards of performance must be met. See the discussion *infra*, pp. 20–26, concerning the finality of decisions made by administrative officers under the contract with respect to matters bearing on "how the contract price is to be computed."

suggestion of gross error on his part (No. 696, R. 46–48)."

Respondent agreed to be bound by the constructing quartermaster's interpretation of the drawings and specifications; it was therefore bound by that officer's interpretation that the footing excavations were to be paid for on the basis of an estimated depth of 37 feet 6 inches.

B. SINCE RESPONDENT DID NOT COMPLY WITH THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES TO WHICH IT HAD AGREED, IT HAD NO STANDING TO SUE FOR BREACH OF CONTRACT BASED ON SUCH DISPUTES

The court below disregarded not only the plain provisions of the contracts which specifically provided for the administrative resolution of differences appearing between the drawings and specifications, but disregarded additionally the equally plain provisions of the contracts which established a procedure for the settlement of disputes arising thereunder.

Article 15 (No. 696, R. 21, 30; No. 697, R. 21–22, 31; *infra*, p. 43) of the contracts directed that all "disputes [except "labor issues"] concerning

[11] While it is our belief that the determination of the constructing quartermaster was clearly correct and the only one supportable under the terms of the contracts and specifications which required the specifications to govern in the event of differences between them and the drawings (*infra*, pp. 43, 45), the court below appears to have considered the question as to the "pay basis" for footing excavations to have been a close one and, after much discussion (No. 696, R. 46–48; No. 697, R. 45), found that "logic and reason tip [ped] the balance in favor of the 33-foot pay basis" (No. 696, R. 48).

questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal * * * to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions." It is now well settled that this provision in Government construction contracts provides "the only avenue for relief" available for the settlement of disputes arising thereunder (*United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61; *United States* v. *Blair*, 321 U. S. 730, 735) and that a contractor who, having accepted and agreed to Article 15, chooses not to follow its procedure to obtain relief, may not thereafter sue to recover damages in the Court of Claims.[12]

In this respect respondent's position differs not at all from that of the respondents in *United States* v. *Callahan Walker Co.*, 317 U. S. 56, and *United States* v. *Blair*, 321 U. S. 730, who were denied recovery by this Court, with respect to specified items, solely on the ground that they had failed to take the administrative appeal provided by Article 15. Indeed, so far as appears here

[12] Compare the analogous doctrine in the field of administrative law that a failure to exhaust administrative remedies precludes resort to the courts. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41; *Macauley* v. *Waterman Steamship Corporation*, No. 435, this Term, decided March 25, 1946; Berger, *Exhaustion of Administrative Remedies* (1939), 48 Yale L. J. 981.

(see No. 696, R. 38; No. 697, R. 39), respondent even failed, as did Mr. Blair (see 321 U. S. at 735), to take an appeal from the constructing quartermaster to the contracting officer. It is submitted that the same reasons which impelled this Court to reverse the Court of Claims in the *Callahan Walker* and *Blair* cases require reversal in the instant cases.

As in the *Blair* case, so here "the Court of Claims sought to justify respondent's failure to pursue the procedure outlined in Article 15." See 321 U. S. at 736. It sought to avoid the effect of the *Callahan Walker* and *Blair* decisions by holding that "no appealable decision" confronted respondent (No. 696, R. 47). Starting with the assumptions that the controversy was not "over what work the contract and its specifications required" but rather "a question of how the contract price is to be computed," and that "the responsibility for making correct payment was on the Finance Officer, the paying officer," the court below concluded that "the decision of the contracting officer as to the amount thereof would have been advisory, at the most, and there was no appealable decision confronting" respondent (No. 696, R. 47). To achieve this result, the court below seized upon the fortuity that, pursuant to the customary practice with respect to Army construction contracts (see Appendix B, *infra*,

p. 48), the cover pages of the contracts (No. 696, R. 12; No. 697, R. 12–13) indicated that payment was to be made "by the Finance Officer, U. S. Army, Fort Sam Houston, Texas." In 1933 and 1934, there were 18 Finance Officers, U. S. Army, located at various places in the United States.[14] All that the notation on the cover of the contract meant, and all it could possibly mean, was that payment would be made by the Finance Officer at Fort Sam Houston, Texas, and not by any other Finance Officer located elsewhere. See Appendix B, *infra*, p. 48. Indeed, as a matter of administrative practice, it has consistently been recognized that the "designation of the Finance Officer is not a term of the contract" and that he is not authorized to, and "would not in practice alter or modify" the decisions of a constructing quartermaster "as to the basis on which payments can be made under the contract when such basis, as here, is dependent upon an interpretation of the specifications or has been covered by a decision on a dispute by the contracting officer." Appendix B, *infra*, pp. 48, 50.[15]

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[13] The statement of administrative practice in this regard which appears as Appendix B, *infra*, pp. 48–51, was submitted to the court below with the motion for a new trial. Cf. *Minnesota* v. *United States*, 305 U. S. 382, 390.

[14] Army List and Directory, Jan. 1, 1933, p. 31; *ibid.*, July 20, 1933, p. 34; *ibid.*, Dec. 20, 1933, p. 19; *ibid.*, Apr. 20, 1934, p. 19; *ibid.*, Oct. 20, 1934, p. 19.

[15] "Finance officers as a rule have no experience with construction and would not be qualified to make such decisions." Appendix B, *infra*, p. 51.

The decision of the court below appears to be that, since the finance officer is concerned with making payment, any dispute relating to "how the contract price is to be computed" (No. 696, R. 47) is his to resolve; that, with respect to such matters, the decision of the contracting officer would be "advisory, at the most;" and that, since the contracts do not state that the finance officer's decisions shall be conclusive on the parties or that appeals lie from finance officer's decisions to some other Government officer,[16] the court was free to decide the dispute itself, substituting its judgment for that of the constructing quartermaster despite the fact that respondent took no appeal therefrom.

The fallacy of this syllogism is revealed, first, by the fact that the finance officer is nowhere mentioned in the contracts nor his duties thereunder referred to.[17] In addition, it is to be noted that Article 15 provides for the settlement of "all" disputes "concerning questions arising under this contract." Article 15 does not exclude from the authority of the contracting officer jurisdiction over and final decision (subject to appeal to the head of the department) of questions

[16] The contracts here in question could not very well have stated any such thing since they do not even mention the finance officer.

[17] A "Finance Officer, U. S. Army," is a regional disbursing officer for War Department activities. See par. 10, Army Regulations 35–5, dated June 6, 1930, and still in force.

affecting the amount of payment." And it cannot be denied that such questions are preeminently "questions arising under" the contract.

We believe it a truism that contractors do not engage in disputes with constructing quartermasters or other Government representatives as a matter of principle, but for money, and it would be a rare dispute, indeed, whose decision would not affect in some measure the amount of pay the contractor would get for the work performed. If the finance officer could review the decision of the contracting officer upon all questions relating to the computation of or affecting the amount of payment, as the decisions below indicate, it would be difficult to conceive of any questions that would be left open to the contracting officer for final decision subject to appeal to the head of the department. Decisions as to the most common type of disputes would be subject to the finance officer's review, despite the failure of the contract even to mention the finance officer at all.[17]

[16] Articles 3, 4, 5, and 9 of the contracts (No. 696, R. 14–15, 18–19; No. 697, R. 15–16, 19–20) also evidence the understanding of the parties that the contracting officer may make final decision of matters relating to amount of payment. The decisions below would nullify these provisions of the contract as well as Article 15.

[17] If, for example, a contractor, under contract to be paid per cubic yard excavated, claimed to have excavated 2,500 cubic yards and the contracting officer decided that he had excavated only 2,000, the contracting officer's decision of such a question of fact would be neither final nor appealable, under

In *Plumley* v. *United States*, 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *United States* v. *McShain*, 308 U. S. 512, 520–521; *United States* v. *Callahan Walker Co.*, 317 U. S. 56; and *United States* v. *Blair*, 321 U. S. 730, the controversies in which the decision of the contracting officer or head of the department was upheld by this Court all involved the amount of the contractor's compensation. Indeed, in the *McShain* case, the situation was virtually identical with the one involved here. There a dispute arose between the contractor's superintendent and the Government's construction officer at the site as to whether certain backfill was to be gravel or earth. See *McShain* v. *United States*, 88 C. Cls. 284, 288–289. The specifications provided for gravel backfill over certain subdrains, referring to the drawings for details; and that all other backfill should be earth. 88 C. Cls. at 288. The drawing referred to did not show gravel backfill over the subdrains in question. *Ibid.* In order to prevent the dispute's delaying the project, the Government's construction officer requested the contractor to proceed with the work, using gravel backfill, subject to a later cost adjustment. 88 C. Cls. at 289.

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the decisions below, because of the disbursing officer's responsibility for payment. Nor, under the decisions below, would such decision of the contracting officer be final if, in settling the dispute, he decided that the contractor *had* excavated 2,500 cubic yards. Cf. *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, affirmed on rehearing, 261 U. S. 610.

The McShain contract, as did those here involved, provided that "In case of difference between drawings and specifications, the specifications shall govern" and that the contracting officer or his representative was the interpreter of the drawings and specifications. See the Government's Brief in the *McShain* case, No. 43, Oct. Term, 1939, pp. 4–5, 19–20; Brief for McShain, p. 3. The McShain contract also contained the standard Article 15. *Ibid.* The contracting officer denied McShain's claim for the cost of installing the gravel backfilling. 88 C. Cls. at 289. On appeal to the head of the department, the claim was again rejected. *Ibid.* The Court of Claims allowed McShain recovery of that cost. 88 C. Cls. at 289, 295–297, 299. On certiorari, this Court reversed, *per curiam*, 303 U. S. 542, 520–521, on the authority of the holdings in *Plumley* v. *United States*, 226 U. S. 545, 547, and *Merrill Rockgable Co.* v. *United States*, 241 U. S. 387, 393, as to the finality of decisions of administrative officers to whom the parties to a contract entrust the settlement of disputes and of questions of interpretation of the specifications and drawings. The contracting officer's decision in the *McShain* case and that of the head of the department were not the less final merely because the controversy was as to whether the contractor was to receive extra compensation for gravel backfill and the administrative officers who decided the question were not the person who actually paid out the money.

The decision below, however, says, in effect, that while the Government and its contractors may contract to be bound by the interpretations and, in the event of disputes, by the decision of stated administrative officers, they will not be so bound if the interpretations or decisions involve the amount of money the contractor is to receive and the administrative officers mentioned in the contract are not those who actually pay out the money. Such a decision runs counter to the whole course of decision of this Court in Government contract litigation. Obviously, the mere indication on the covers of the contracts here involved that "the Finance Officer of a particular district" would serve as disbursing officer (*infra*, p. 48) did not derogate from the procedures established by the contracts with respect to the settlement of disputes arising thereunder.

C. IN ANY EVENT, THE CONSTRUCTING QUARTERMASTER'S INTERPRETATION OF THE SPECIFICATIONS AND DRAWINGS WAS CORRECT AND THAT OF THE COURT BELOW ERRONEOUS

While in our view the constructing quartermaster's interpretation of the specifications and drawings as to the "pay basis" for the footing excavations and respondent's failure to appeal therefrom are dispositive of the present cases, we believe that the decision below on the merits of the controversy is likewise erroneous.

Although the specifications (paragraph 3, No. 696, R. 36; No. 697, R. 37; *infra*, pp. 45–46) provided

that "excavations for footings shall be carried down to the depths and levels shown on drawings," they also provided (paragraph 4, No. 696, R. 37; No. 697, R. 38; *infra*, pp. 46–47) that "for estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level" and that "for any additions or deductions" "the unit prices quoted in bid will govern." Paragraph 45 of the specifications (No. 696, R. 37; No. 697, R. 38; *infra*, p. 47) provided for additional payment to respondent for the "extension of foundations beyond dimensions given on the drawings" and for deduction from the contract price "if solid foundation is found at a lesser depth than the dimension given on the drawings." The court below found that "the depth of footings was shown on the drawings as 33 feet from the finished floor of the building" (No. 696, R. 37; No. 697, R. 38).

The Government paid respondent for the footing excavations on the basis of the provision in the specifications that the depths of foundations be estimated on the basis of 37 feet 6 inches below first floor level. It thus resolved the discrepancy between the provisions of the specifications and drawings in the only way it could be resolved under the terms of the contract, since Article 2 of the contract (No. 696, R. 14; No. 697, R. 14, *infra*, p. 43) and paragraph G. C. 21 of the speci-

fications (*infra*, p. 45) provided that "in case of difference between drawings and specifications, the specifications shall govern." The court below found that respondent had estimated its bid on the 33-foot basis (No. 696, R. 37; No. 697, R. 35) but that respondent "had as full a notice of the 37-foot 6-inch provision as it had of the 33-foot and may not say it was misled" (No. 696, R. 47). Despite this, however, and despite the clear direction in the contract repeated in the specifications as to how the drawings and specifications, where they appear to differ, must be reconciled, the court below held them to be irreconcilable (No. 696, R. 47) and concluded that the excavations were to be paid for on the 33-foot basis (No. 696, R. 47–48; No. 697, R. 45).

The court said that "by using the 37-foot 6-inch pay basis there resulted no additions whatever to the contract price, only deductions, a one-sided proposition, somewhat to [respondent's] discomfiture" (No. 696, R. 48), and chose the 33-foot basis as "the more logical of the two, for the 33 feet were shown on the drawings and that turned out to be approximately the average, and such a pay basis would involve both deductions and additions to the contract price * * * when the work was done and the accounts cast up" (No. 696, R. 47–48).

The court's "logic," however, lacks support in the facts. On the basis of the court's findings

(No. 696, R. 37, 47; No. 697, R. 38), it is clear that actual footing depths were unforeseeable; and it was for this reason that the specifications provided for additions to and deductions from the contract price, depending upon variations in the actual depths of the footing excavations. The variations were considerable: In No. 696, the depths from the first floor ranged from 29 to 37.5 feet, with an average of 32.49 feet (R. 37); in No. 697, they ranged from 27.58 feet to 42.42 feet, with an average of 34.43 feet (R. 39). On the basis of the range of depths in No. 696, the court below held that, since 37 feet 6 inches turned out to be the maximum depth, thereby resulting in "no additions whatever to the contract price, only deductions, * * * it was superfluous to talk about additions to the contract price, if there were to be none" and "logic and reason tip[ped] the balance in favor of the 33-foot pay basis" (R. 48).

In short, the "logic and reason" of the court below amount to this: At the time the contracts were entered into, actual footing depths were unforeseeable; it was clear only that their depths would vary. At that time the parties did not know whether 33 feet would be the minimum, the maximum, or the average depth. Neither did they know that with respect to the 37 feet 6 inches referred to in the specifications. Nor did they know whether the adoption of either of these figures as the "pay basis" would result only in

additions to the contract price or only in deductions therefrom or in both additions and deductions. It was only, as the court below itself found, "when the work was done and the accounts cast up" (No. 696, R. 48) that it appeared that, in No. 696, 33 feet was approximately the average footing depth and 37 feet 6 inches the maximum. The court below has thus ascribed to the parties to the contract a prescience as to the outcome of the footing excavations and an intention to contract on the basis of that prescience. We submit that logic and reason do not lead to such a result.

The unreasonableness of the decision below in this respect is demonstrated by the court's adherence in No. 697 to the same basis of decision it adopted in No. 696 (No. 697, R. 45) despite its own recognition that the "logic and reason" of No. 696 applied to the facts in No. 697 do not necessarily result in the same conclusion (No. 697, R. 45), for in No. 697 the maximum footing depth was almost five feet greater than in No. 696 (No. 696, R. 37; No. 697, R. 39) so that the use of the 37-foot 6-inch "pay basis" in No. 697 resulted in additions to as well as deductions from the contract price.

We submit, therefore, that the court below erred in allowing respondent to recover on its claims with respect to footing excavations and that its judgments in this respect should be reversed.

II. The United States is not liable under its contract for the increased wages respondent paid to its bricklayers

The court below erred also in entering judgment for respondent for the difference, in terms of wages paid its bricklayers, between the $1.00-per-hour minimum wage for skilled labor provided in Article 18 (a) of the contracts (No. 696, R. 23, 33; No. 697, R. 23, 34–35; *infra*, p. 44) and the $1.25 per hour the respondent paid its bricklayers, after being told to do so by the constructing quartermaster (No. 696, R. 34; No. 697, R. 35). In this connection as with respect to its decision of the question as to the basis of pay for the footing excavations, *supra*, the basic error of the court below lay in its failure to follow or apply the plain terms of the contracts.

A. Since respondent did not comply with the procedure for the settlement of disputes to which it had agreed, it had no standing to sue for breach of contract based on such disputes

The wages required to be paid by respondent were determined by Article 18 of the contracts (No. 696, R. 23–24, 33–34; No. 697, R. 23–24, 34–35; *infra*, pp. 43–44). Under Article 18 (a) (No. 696, R. 23, 33; No. 697, R. 23, 34; *infra*, pp. 43–44), minimum wage rates for skilled labor were established at $1.00 per hour.[20] Article 18 (c) (No. 696, R. 23, 33; No. 697, R. 24, 34; *infra*, p. 44) provided, however, that "in the event that the

[20] See note, *supra*, p. 7.

prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply." Article 18 (e) (No. 696, R. 24, 33; No. 697, R. 24, 34–35; *infra*, p. 44) provided:

> The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly * * *.

On March 3, 1934, the Board of Labor Review of the Federal Emergency Administration of Public Works ruled that bricklayers employed on another project for Army construction, at San Antonio, Texas,[2] to which respondent was not a party, should be paid at the rate of $1.25 per hour retroactive to February 2, 1934 (No. 696, R. 34; No. 697, R. 35). This decision was transmitted to respondent by the constructing quartermaster on March 20, 1934 (No. 696, R. 34; No. 697, R. 35). On March 23, 1934, the constructing quartermaster advised respondent that all bricklayers employed on the project here involved "will be

[2] "Fort Sam Houston and San Antonio are in the same vicinity" (No. 696, R. 45).

paid at the rate of $1.25 per hour" (No. 696, R. 34; No. 697, R. 35). On March 29, 1934, respondent stated "that it would be governed accordingly but under protest, and [that it] expected reimbursement of the difference of 25 cents per hour" (No. 696, R. 34; No. 697, R. 35). On May 12, 1934, the constructing quartermaster "advised" respondent "that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity, should be paid $1.25 per hour, retroactive to February 2, 1934," and that respondent "would be within its 'rights to file appeal with the Board of Labor Review from the decision of the contracting officer'" (No. 696, R. 34; No. 697, R. 35). Respondent took no such appeal but paid its bricklayers $1.25 per hour (No. 696, R. 34–35; No. 697, R. 36).

As we have shown above in connection with the question of footing excavations, Article 15 of the contracts (No. 696, R. 21, 30; No. 697, R. 21–22, 31; *infra*, p. 43) provided for the decision of all disputes, except labor disputes, "concerning questions arising under this contract" "by the contracting officer or his duly authorized representative, subject to written appeal by the contractor * * * to the head of the department." Although respondent failed to exercise its right of appeal under Article 15, and despite this Court's repeated ruling that Article 15 pre-

sents "'the only avenue for relief,' *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61, available for the settlement of disputes concerning questions arising under this contract" (*United States* v. *Blair*, 321 U. S. 730, 735), the court below allowed respondent recovery for the increased wages paid by it pursuant to the unappealed ruling of the constructing quartermaster and contracting officer.

That there was a dispute with respect to the additional wage payments cannot be denied. As the court below found (No. 696, R. 34; No. 697, R. 35), respondent acceded to the constructing quartermaster's "advice" "under protest". This reservation, however, while it evidenced the disagreement which existed between respondent, on the one hand, and the constructing quartermaster and contracting officer, on the other, with respect to whether the additional wages should be paid, did not save respondent's rights; the contracts did not recognize "protests" as such, but only appeals to the head of the department.

As it had done in the *Blair* case, 321 U. S. at 736, and as with respect to respondent's "failure to pursue the procedure outlined in Article 15" in connection with the question concerning the footing excavations (*supra*, p. 20), the court below also sought to justify respondent's failure to appeal with respect to the increased wages it was required to pay, on the ground that "it was plainly of no special interest to [respondent] to make

such an appeal,[22] for the contract provided an automatic increase in contract price to cover such an increase in wages" (No. 696, R. 45). That justification, however, lacks merit. For the court's assumption that the wage increase automatically resulted in an increase in the contract price[23] was the very issue that was in dispute and that should have been decided under Article 15.[24]

The decision of the constructing quartermaster and contracting officer that the respondent in-

[22] The appeal referred to by the court below was to the Board of Labor Review (No. 696, R. 45) as the constructing quartermaster, when advising respondent that the contracting officer had decided that the bricklayers should be paid $1.25 per hour, had further advised respondent that it "would be within its 'rights to file appeal with the Board of Labor Review from the decision of the contracting officer'" (No. 696, R. 34; No. 697, R. 35). In this we submit the constructing quartermaster was wrong as the Board of Labor Review was charged with the decision only of "labor issues" (No. 696, R. 21, 24, 30, 34; No. 697, R. 21, 24, 31, 35; *infra*, pp. 43–45), clearly embracing only issues between employers and employees. There was no such controversy, however, between respondent and its employees. Cf. *Blair* v. *United States*, 99 C. Cls. 71, 136, 149–151, reversed in other respects, 321 U. S. 730. The only controversy was between respondent and the Government.

[23] This assumption, as we point out below, pp. 38–41, was founded upon a misinterpretation of the contracts.

[24] It is to be noted that respondent does not appear to have shared the court's belief that "the contract provided an automatic increase in contract price to cover" the increase in wages being paid by respondent (No. 696, R. 45), for, had respondent so believed, it is certainly doubtful whether respondent would have protested against paying the increased wages (No. 696, R. 34; No. 697, R. 35).

crease its bricklayers' wages to $1.25 per hour appears to have been based on the theory that the ruling of the Board of Labor Review with respect to the Army construction project at San Antonio in effect determined that the prevailing hourly wage for bricklayers "proscribed under collective agreements or understandings between organized labor and employers on April 30, 1933," was $1.25 per hour. In that event, under Article 18 (c) of the contracts respondent was required to increase its bricklayers' wages up to that amount regardless of whether or not it was told to do so by the constructing quartermaster or the contracting officer. If the prevailing hourly wage for bricklayers "prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933," was not $1.25, then neither the constructing quartermaster nor the contracting officer was authorized to order respondent to pay wages at that rate. It was only if respondent's minimum wage rates were changed "by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review," that a contract price adjustment would result. Article 18 (e), No. 696, R. 24, 33; No. 697, R. 24, 34–35; *infra*, p. 44.

Thus, the questions as to whether the increase in bricklayers' wages "advised" by the constructing quartermaster was an increase under

Article 18 (c) of the contract;[25] whether respondent would receive a contract price adjustment on account of the increase; whether the constructing quartermaster or contracting officer had authority to direct respondent to make such an increase; whether the prevailing hourly wage for bricklayers "prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933," was $1.25; and, in short, whether respondent was obliged to increase its bricklayers' wages were obviously questions arising under the contract as to which respondent and the Government's representatives were in dispute and it was obviously for the purpose of adjusting such disputes that the parties had established the appeals procedure embodied in Article 15. If the constructing quartermaster or contracting officer exceeded or otherwise abused their authority in directing the increased wage payments, the procedure of Article 15 "provided a complete and reasonable means of correcting the abuses." *United States* v. *Blair*, 321 U. S. 730, 735. As this Court stated in that case (*ibid.*):

> Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactory by their superiors. Furthermore, Article 15 provided the Govern-

[25] The very ambiguity as to the basis for the increase underscores the need for administrative appeal, such as that provided by Article 15, to clarify the issue.

ment with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages[26] and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims.

We submit that respondent, having failed to avail itself of the procedure for the settlement of disputes provided in Article 15 of the contracts, may not recover on its claims for the increased wages it paid its bricklayers.

B. SINCE THE INCREASED WAGES RESPONDENT PAID ITS BRICKLAYERS WERE NOT ESTABLISHED BY THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, RESPONDENT WAS NOT ENTITLED TO A CONTRACT PRICE ADJUSTMENT

As noted above, the only provision in respondent's contracts for an increase in contract price based upon increased wages paid by it, is to be found in Article 18 (e) (No. 696, R. 24, 33; No. 697, R. 24, 34–35; *infra*, p. 44). That article provides for such adjustment only if "the Federal Emergency Administration of Public Works on

[26] The accumulation of increased wage payments in the instant cases amounts to $4,120.63 (No. 696, R. 34, 45; No. 697, R. 36, 45).

recommendation of the Board of Labor Review" established minimum wage rates different from those established by the contracts. The court below, in awarding judgment to respondent in the amount of the increased wages it paid its bricklayers, appears to have done so on the theory that the ruling of the Board of Labor Review concerning bricklayers' wages on another Army construction project in the vicinity of Fort Sam Houston applied to respondent's bricklayers, as "the wages prevailing in the vicinity were the wages to apply to a contract within that vicinity" (No. 696, R. 45). It is submitted that the court below was clearly in error.

1. It is to be noted first that, assuming that the constructing quartermaster's "advice" (No. 696, R. 34; No. 697, R. 35) was a direction to respondent to increase the bricklayers' wages, the direction was that of the constructing quartermaster or of the contracting officer. Such a direction, however, is not within the compass of Article 18(e), which provides for contract price adjustments only if the "different minimum wage rates" are "established" by the Federal Emergency Administration of Public Works acting on the recommendation of the Board of Labor Review.

2. Nor, assuming that the constructing quartermaster's "advice" was the transmittal to respondent of the decision of the Board of Labor Review,

is respondent entitled to a contract price adjustment on account of the increased wages paid by it. The decision of the Board of Labor Review on which the constructing quartermaster relied was in a proceeding to which respondent was not a party (No. 696, R. 34; No. 697, R. 35). The decision was in a proceeding involving an Army construction project different from those here involved (No. 696, R. 34; No. 697, R. 35). The decision was that bricklayers employed on *that* project should be paid at the rate of $1.25 per hour (No. 696, R. 34; No. 697, R. 35). It is thus clear that, regardless of what the effect of the decision of the Board of Labor Review may have been, it did not establish minimum wage rates for the respondent different from those provided by respondent's contracts.[27]

[27] It may well be, as suggested *supra*, pp. 35–36, that the effect of the decision of the Board of Labor Review increasing bricklayers' wages on another Army project in the vicinity of Fort Sam Houston was to determine that prevailing hourly wages for bricklayers "prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933," were above the $1.00 specified in Article 18-(a) of respondent's contracts as the minimum hourly rate for skilled labor. In that event, however, the minimum wages required to be paid by respondent were increased not by the Board of Labor Review but by Article 18 (c) of respondent's contracts (No. 696, R. 23, 33; No. 697, R. 24, 34; *infra*, p. 44) and the contracts provide for no adjustment in contract price arising out of minimum wage changes resulting from the provisions of that article.

3. Moreover, even if it be considered that the decision of the Board of Labor Review with respect to the bricklayers' wages on the other Army project in San Antonio effected a change in respondent's bricklayers' wages, respondent may not recover the amount of the increased wages paid by it since Article 18 (e) provides for such a contract price adjustment only if "the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review" "establishes" different minimum wage rates from those established by the contract. (Article 18 (e), No. 696, R. 24, 33, 44; No. 697, R. 24, 34–35; *infra*, p. 44. There is no suggestion by the court below, nor could there be, that the respondent's bricklayers' wage rates were changed by the Federal Emergency Administration of Public Works or that the $1.25 rate paid by respondent was established by the Federal Emergency Administration of Public Works.[28]

We submit, therefore, that respondent may not recover the amount of the increase in wages it paid its bricklayers.

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[28] Indeed, there is not even the suggestion below that the $1.25 wage rate which the Board of Labor Review ruled was applicable to the bricklayers employed on the other Army construction project in San Antonio was established with respect to that project by the Federal Emergency Administration of Public Works.

CONCLUSION

For the reasons stated, we respectfully submit that the judgments below are erroneous and should be reversed.

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APRIL 1946.

APPENDIX A

CONTRACT PROVISIONS

ART. 2. *Specifications and drawings.*—* * * In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. * * *

* * * * *

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

* * * * *

ART. 18. *Wages.*—(a) All employees directly employed on this work shall be paid just and

reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.00
Unskilled labor	.40

[1] In No. 697, the minimum wage for skilled labor was originally $1.10, but was thereafter modified by the parties to $1.00 (R. 35).

* * * * *

(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

* * * * *

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental

changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

SPECIFICATIONS

G. C. 2. *Abbreviations.*—The following abbreviations are used in these specifications: U. S. for United States; Q. M. G. for Quartermaster General; C. Q. M. for Constructing Quartermaster.

* * * * *

G. C. 10. *Interpretation of Contract.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

* * * * *

G. C. 21. *Discrepancies.*—* * * In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the C. Q. M., without ~~whose decision said~~ discrepancy shall not be adjusted by the Contractor, save only at his own risk * * *. In case of difference between drawings and specifications, the specifications shall govern.

* * * * *

3. *Excavation.*—Do all excavating of every description and of whatever substances encountered to the dimensions and levels shown. All excavated material, including top soil, shall be de-

posited around the buildings, where and as directed by the C. Q. M. Top soil shall be stacked separately.

Excavations for footings shall be carried down to the depth and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.

Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.

Care shall be taken not to excavate beyond the depths shown on drawings, as no backfilling under footings will be permitted, and any excess below the levels shown shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact undisturbed bottoms.

All excavations shall be maintained in good order during the progress of the work, and, if necessary, sheet piling shall be used and maintained in position until removal is authorized by the C. Q. M.

4. Excavation for pier foundations will be made with a suitable boring machine acceptable to the C. Q. M. Such excavation will extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended. If wet or unstable materials are encountered in the process of boring holes, the excavation must be cased with metal casings of

ample strength to prevent crushing. Casings may be collapsible or of one length.

Ground water encountered must be kept from the excavation at all times. In no case will water be permitted to reach footing bottoms.

At the contractor's option, reaming of conical shaped bottoms may be performed either by hand or mechanical methods. For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

* * * * *

45. *Footings, etc.*—The Contractor shall see that the bottom of all excavations are undisturbed soil, properly leveled before pouring footings.

Extension of foundations beyond dimensions given on the drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of the bid. If solid foundation is found at a lesser depth than the dimensions given on the drawings, then a credit will be given the U. S., based on the "Unit Prices."

* * * * *

APPENDIX B

STATEMENT OF ADMINISTRATIVE PRACTICE

STATE OF VIRGINIA,

County of Arlington, ss:

Adel C. Harden being duly sworn deposes and says:

I am a Colonel in the Finance Department, United States Army, and am presently assigned as Chief, Receipts and Disbursements Division, Office of the Fiscal Director, Army Service Forces. I have had over twenty-five years experience in fiscal matters and I have years of experience handling disbursing accounts. I have effected payment on many construction contracts.

The practice is to have all contracts made with the Army paid by a disbursing officer after certification by a certifying officer, who may or may not be the same person as the disbursing officer. Usually upon cover pages of all construction contracts, the disbursing officer is designated as the Finance Officer of a particular district. Such a notation appeared on the cover of the contracts involved in the cases of *Joseph A. Holpuch v. The United States*, Court of Claims Nos. 43809 and 43812, as follows:

> To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, Texas.

This is merely an indication to the constructing quartermaster to which disbursing officer the constructing quartermaster should certify vouchers. The designation of the Finance Officer is not a term of the contract. It is part of an outline

showing the parties, the amount, the site of the work, the services to be performed, and the authorized accounts to which payments will be charged. The contract preamble and all of the contract terms follow the designation of the disbursing officer, which office might on Army orders be changed at any time. In making such a change the War Department would definitely not seek the consent of the contractor.

The contracts themselves provided:

> ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.
>
> ART. 16. *Payments to contractors.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration. * * *

Article G. C. 10 of the specifications provided:

> *Interpretation of contract.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. (meaning the defendant's constructing quartermaster), shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

On a construction contract containing the above terms the disbursing officer would not in practice alter or modify and would not be authorized to alter or modify the decision of a certifying construction quartermaster as to the basis on which payments can be made under the contract when such basis, as here, is dependent upon an interpretation of the specifications or has been covered by a decision on a dispute by the contracting officer. If the disbursing officer desired to question the propriety of making payment based on such an interpretation or decision he could submit the matter to the Comptroller General as a request for advance decision (31 U. S. C. 74) or he could transmit the matter to the General Accounting Office for settlement (31 U. S. C. 71).

I understand that payment for excavation of foundations was made in a monthly progress payment certified to by the constructing quartermaster; that in certifying the voucher for such payment the constructing quartermaster determined that the correct base for figuring additions

or deductions to the contract at unit prices was 37 feet 6 inches rather than 33 feet. Such a decision in our practice would not be made by a disbursing officer, because we would consider it to have been made under paragraph GC–10 of the specifications. Therefore, the Finance Officer would have no duty or authority to overrule it. Only if it were apparent that fraud was being practiced might the disbursing officer question any such payment. I also understand that the contractor protested the use of the 37 foot 6 inch base, whereupon the constructing quartermaster decided the dispute by overruling the contractor's protest and thereafter the contractor took no appeal either to the contracting officer or to the head of the Department. Our practice would be that where the constructing quartermaster as representative of the contracting officer decides such a dispute pursuant to Article 15 of the contract, the disbursing officer has no power to challenge such a ruling.

Another reason why the Finance Officer would not undertake to determine the question presented in this case is that finance officers as a rule have no experience with construction and would not be qualified to make such decisions.

(Signed) A. C. HARDEN,
Colonel, FD.

Sworn to before me this 27th day of June 1945.

J. LINDEN WILL,
Notary Public, Arlington County, Virginia.

My commission expires December 11, 1946.

U. S. GOVERNMENT PRINTING OFFICE 1946

SUPREME COURT OF THE UNITED STATES.

Nos. 696 and 697.—October Term, 1945.

696	The United States, Petitioner, *vs.* Joseph A. Holpuch Company.	On Writs of Certiorari to the Court of Claims.
697	The United States, Petitioner, *vs.* Joseph A. Holpuch Company.	

[May 20, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

The narrow question here is whether a contractor's failure to exhaust the administrative appeal provisions of a Government construction contract bars him from bringing suit in the Court of Claims to recover damages.

Respondent, a building contractor, entered into two contracts[1] with the United States through the War Department in 1933 to construct officers' quarters at Fort Sam Houston, Texas, which were being built as a Federal Emergency Administration of Public Works project. Disputes arose as to excavations for footings and as to increased wages ordered to be paid to respondent's bricklayers. Respondent brought suit against the Government on these matters in the Court of Claims, which entered judgments in favor of respondent on both items.[2]

Article 15, which appeared in both contracts, provided: "All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written

[1] The contracts here involved were both executed on U. S. Government Form No. P. W. A. 51.

[2] The Court of Claims entered separate judgments and opinions in relation to each of the two contracts, although both of them were identical and involved the same issues. The only difference between the contracts concerned the particular buildings to be constructed.

appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed."

The dispute concerning the footing excavations arose out of an apparent inconsistency between certain figures used in the specifications and in the drawings. The specifications estimated that respondent was to excavate to a depth of 37½ feet below the first floor level of the buildings. The drawings, on the other hand, were found by the Court of Claims to call for excavations to the depth of 33 feet. Additional payments were to be made to respondent for excavations deeper than indicated "on the drawings," while the Government was to receive a credit for excavations of a lesser depth. Respondent made various excavations ranging in depth from 27.58 feet to 42.42 feet. The problem thus presented itself as to whether the 37½-foot figure in the specifications or the 33-foot figure in the drawings should serve as the basis for extra compensation to the respondent and for credit to the Government.

Article 2 of the contracts provided: "In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer." The specifications contained a similar provision and added that the constructing quartermaster was to be the interpreter of the "intent and meaning of the drawings and specifications." The constructing quartermaster duly resolved the discrepancy in this instance by interpreting the specifications and drawings to mean that the footing excavations were to be paid for on the basis of the 37½ feet estimated in the specifications. Respondent made no attempt to appeal from this decision to the contracting officer or to the departmental head in accordance with the terms of Article 15.

The other dispute concerned a required increase in wages for respondent's bricklayers. The contracts established $1.00 per hour as the minimum wage rate for skilled labor unless, as of April 30, 1933, there should be a higher prevailing hourly rate prescribed by collective agreements between employers and

employees. Article 18(e) provided that this minimum wage rate "shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review," in which case "the contract price shall be adjusted accordingly." On March 3, 1934, the Board of Labor Review ruled that bricklayers on another Army construction project at San Antonio, Texas, with which respondent was unconnected, should be paid at the rate of $1.25 per hour retroactive to February 2, 1934. Respondent was informed of this decision and on March 23, 1934, the constructing quartermaster advised respondent that all bricklayers employed on the instant project "will be paid at the rate of $1.25 per hour." Respondent stated that it "would be governed accordingly but under protest, and [that it] expected reimbursement of the difference of 25 cents per hour." On May 12, 1934, the constructing quartermaster advised respondent "that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity [Fort Sam Houston is in this vicinity] should be paid $1.25 per hour, retroactive to February 2, 1934," and that respondent would be within its rights "to file appeal with the Board of Labor Review from the decision of the contracting officer."[3] No such appeal was taken; respondent merely paid its bricklayers $1.25 per hour and then filed a claim in the court below for the 25-cent differential. Here again the provisions of Article 15 were ignored.

We cannot sanction respondent's failure to abide by the appeal provisions of Article 15 of the contracts which it made with the United States. Both the dispute over the footing excavations and the dispute over the bricklayers' wages were "questions arising under this contract" within the meaning of Article 15. The first was a question arising under Article 2 of the contracts as well

[3] The constructing quartermaster was in error in stating that respondent could have appealed the wage increase decision to the Board of Labor Review. Under Article 15, the Board is charged with handling appeals only on matters involving "labor issues." This plainly means labor issues between employers and employees. See Blair v. United States, 99 Ct. Cls. 71, 149-150, reversed in other respects, 321 U. S. 730. Here, however, the only controversy lay between the respondent and the Government rather than between respondent and its bricklayers. Hence the ordinary review provisions of Article 15 were applicable, enabling respondent to appeal the contracting officer's decision to the departmental head or his representative. The Court of Claims made a like error in this respect.

as under the specifications, which expressly contemplated that Government officers would resolve all discrepancies between specifications and drawings. Their decisions in such matters were clearly appealable under Article 15. The second dispute was a question arising under the wage provisions of Article 18 of the contracts; that question involved a consideration of the factual situation surrounding the required wage increase and a determination of the validity and effect of the increase under the circumstances. Any decision or order of a subordinate Government officer in this respect was also appealable under Article 15. Yet respondent did not even seek the contracting officer's opinion as to the footing excavation decision of the constructing quartermaster. And as to the contracting officer's order requiring an increase in the bricklayers' wages, respondent neglected to file a written appeal to the departmental head or his representative.

But Article 15 is something more than a dead letter to be revived only at the convenience or discretion of the contractor. It is a clear, unambiguous provision applicable at all times and binding on all parties to the contract. No court is justified in disregarding its letter or spirit. Article 15 is controlling as to all disputes "concerning questions arising under this contract" unless otherwise specified in the contract. It creates a mechanism whereby adjustments may be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created. *United States* v. *Blair*, 321 U. S. 730, 735. This mechanism, moreover, is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract. *United States* v. *Blair, supra*, 735; *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61. And in the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court.

It follows that when a contractor chooses without due cause to ignore the provisions of Article 15 he destroys his right to sue for damages in the Court of Claims. That court is then obliged to outlaw his claims, whatever may be their equity. To do otherwise is to rewrite the contract.

In this instance no justifiable excuse is apparent for respondent's failure to exhaust the appeal provisions of Article 15. Certainly the reasons relied upon by the Court of Claims are

lacking in merit. The court felt that the dispute over the footing excavation figures involved only a matter of contract price computation and that the responsibility for such a computation rested solely with the Army Finance Officer at Fort Sam Houston, any decision by the contracting officer on the matter being no more than advisory. Since the contracts made no provision for an appeal of the Finance Officer's computation, the Court of Claims held that there was no appealable decision confronting respondent and that respondent's claim could be heard and determined by that court. Support for this novel interpretation was sought in the statement on the covers of the contracts that payment on the contracts was to be made "by the Finance Officer, U. S. Army, Fort Sam Houston, Texas."[4] The short answer is that this designation of a disbursing officer is not a part of the contracts and cannot be used in any way to alter or amend any actual provisions thereof. The designation only identifies the person whose duty it is to perform the ministerial function of disbursement and is subject to change at any time by the War Department without notice to the contractor.[4] Moreover, even if it be assumed that the issue did concern only the amount of payment under the contracts,[5] such an issue is a question arising under

[4] The Government points out that in 1933 and 1934 there were 18 Army Finance Officers located at various places in the United States and that all the notation on the cover could mean was that payment was to be made by the Finance Officer at Fort Sam Houston, Texas, and not by a Finance Officer located elsewhere.

Moreover, an affidavit by the Chief, Receipts and Disbursements Division, Office of the Fiscal Director, Army Service Forces, appearing as an appendix to the Government's brief, states in regard to the notation: "This is merely an indication to the constructing quartermaster to which disbursing officer the constructing quartermaster should certify vouchers. The designation of the Finance Officer is not a term of the contract. It is part of an outline showing the parties, the amount, the site of the work, the services to be performed, and the authorized accounts to which payments will be charged. . . . On a construction contract containing the above terms the disbursing officer would not in practice alter or modify and would not be authorized to alter or modify the decision of a certifying construction quartermaster as to the basis on which payments can be made under the contract when such basis, as here, is dependent upon an interpretation of the specifications or has been covered by a decision on a dispute by the contracting officer. . . . Another reason why the Finance Officer would not undertake to determine the question presented in this case is that finance officers as a rule have no experience with construction and would not be qualified to make such decisions."

[5] Such an assumption is faulty in that nearly every dispute between a contractor and the Government ultimately involves the amount of payment under the contract. Hence, under the view of the Court of Claims, all such disputes would be subject to the Finance Officer's review, thereby nullifying Article 15 as well as other portions of the contract contemplating final decision by the contracting officer or the departmental head on these matters.

the contracts and hence expressly subject to the provisions of Article 15.

The Court of Claims sought to justify respondent's refusal to appeal the contracting officer's decision to increase the bricklayers' wages by holding that this decision automatically increased the contract price under the terms of Article 18(e). It stated that the constructing quartermaster reasonably construed the ruling of the Board of Labor Review in regard to the San Antonio project as applicable to the vicinity of San Antonio as well, the wages prevailing in the vicinity being the wages to apply to a contract within that vicinity. Thus it was said that it was plainly of no special interest to respondent to appeal the contracting officer's decision. But the assumption that this decision automatically resulted in a contract price increase is not in accord with the facts or with the contract provisions. Under Article 18(e) no automatic price increase results unless the wage change is established by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review.[6] The Board alone cannot effect a change; it can only make a recommendation. Here, however, there was no evidence that the wage increase either as to respondent or as to the San Antonio project was established by the Federal Emergency Administration of Public Works, the only agency that had authority to do so. Accordingly the provision of Article 18(e) for an automatic price increase did not come into operation, as was recognized by respondent in its protest. Serious questions were thus raised as to the authority of the contracting officer to direct a wage increase under these circumstances and as to the validity and effect of the ruling of the Board of Labor Review. Respondent should have secured a determination of those questions by challenging the contracting officer's decision pursuant to the provisions of Article 15.

Respondent having failed to avail itself of the procedure created by Article 15 for the settlement of disputes arising under

[6] The Board of Labor Review, although a part of the Federal Emergency Administration of Public Works, is a distinct entity. And Article 15 of the contracts made a clear functional distinction between the two in regard to wage rate increases. We are not free to disregard that distinction and rewrite the procedure established by Article 18(e).

the contracts, it was precluded from bringing suit on such matters in the Court of Claims. And the Court of Claims erred in entertaining and deciding the claims involving those disputes.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice DOUGLAS, dissenting in part.

The Court requires this contractor to pay out of his own pocket the wage increase which he was directed to make. Whatever support that conclusion may have in a literal reading of the contract, it is so harsh and unfair as to be avoided if the contract does not compel the result. I do not think it does.

The contract set a minimum wage rate of $1 an hour for bricklayers. But it also provided that if the "prevailing" hourly rates under agreements between organized labor and employers on April 30, 1933, were above that minimum rate, the higher rate would become the minimum and be paid.[1] The Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review could change the contract rate of $1 an hour; it could also change the "prevailing" hourly rate. If it did either, it would establish a "different" minimum or other rate within the meaning of the contract.[2] And the contract price would be adjusted accordingly.

The Board of Labor Review, acting for the Federal Emergency Administration of Public Works,[3] ruled that bricklayers on another

[1] "In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract."

[2] "The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract."

[3] The suggestion that the wage increase at San Antonio was not authorized by the Federal Emergency Administration of Public Works is not warranted by the record. The Board of Labor Review is a part of the Federal Emer-

government project at San Antonio should be paid at the rate of $1.25 an hour. San Antonio, as held by the Court of Claims, is in the same vicinity as Fort Sam Houston where the previous projects were under way. And plainly the "prevailing" hourly rate refers to the rate which obtains in the vicinity.

So the respondent paid the several wages under a ruling which, as I read the contract, was binding on him. It seems therefore manifestly unfair to hold that he must pay the wage increase out of his own pocket.

A contractor confronted with an order of the quartermaster to raise the wages of his employees is in an extremely difficult position. If he disobeys the order, he risks a strike and industrial turmoil. Yet the Court holds that he must take that risk or else pay the wage increase from his own pocket. Such a literal reading of the contract is not a fair one. And it is not a necessary one, as I have shown. Hence I would choose a construction which avoided that harsh and unfair result and did not victimize the contractor. If he had not protested the order of the quartermaster but had acquiesced, I suppose no one would say that there had been a "dispute concerning questions arising under" the contract,[4] which should have been or could have been appealed. It is not doubted that then the contractor would be entitled to reimbursement. I see no difference in substance if the contractor, after an initial protest, acquiesces in the ruling and accepts the new "prevailing" rate and thus avoids dissension with his employees.

There is justice in what the Court of Claims ruled and I would sustain it.

Mr Justice FRANKFURTER and Mr. Justice RUTLEDGE join in this dissent.

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gency Administration of Public Works. It did not "recommend" an increase at San Antonio. It "formally ruled" that the bricklayers on that project "should be paid at the rate of $1.25 per hour." The Court of Claims treated that action by the Federal Emergency Administration of Public Works. That seems to me to be the fair construction; and it was so treated both by the quartermaster and the contractor.

[4] The government concedes that the quartermaster's advice to respondent that he could file an appeal with the Board of Labor Review was erroneous. It points out that the Board of Labor Review was charged with the decision only of "labor issues", which embrace controversies between employers and employees. The confusion existing in the mind of the government's own representative emphasizes the trap set for this contractor whether he followed the quartermaster's suggestion or acquiesced in his ruling.